

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JUDY ANN PLACENCIA,

Plaintiff,

v.

WORLD SAVINGS BANK, FSB, a/k/a
WELLS FARGO BANK, N.A., a/k/a
WACHOVIA MORTGAGE, f/k/a
WACHOVIA MORTGAGE, FSB,

Defendant.

No. CV-10-1130-HU

**FINDINGS AND RECOMMENDATION
ON MOTION TO DISMISS**

Judy Ann Placencia
32620 S.W. Lake Point Court
P.O. Box 4187
Wilsonville, Oregon 97070

Plaintiff *Pro Se*

Julie M. Engbloom
Pilar C. French
LANE POWELL PC
601 S.W. Second Avenue, Suite 2100
Portland, Oregon 97204-3158

Attorneys for Defendant

1 HUBEL, Magistrate Judge:

2 The *pro se* plaintiff Judy Ann Placencia brings this action
3 against the defendant World Savings Bank, now known as Wells Fargo
4 Bank, challenging the nonjudicial foreclosure of real property. The
5 defendant removed the action to this court from Clackamas County
6 Circuit Court on the basis of diversity jurisdiction. The
7 plaintiff filed a motion for remand that was denied by the court.

8 See Dkt. #38.

9 The matter is now before the court on the defendant's motion
10 to dismiss the complaint. Dkt. #3. For the reasons discussed
11 below, I recommend that the motion be granted.

12
13 **BACKGROUND**

14 The plaintiff filed this action in state court on August 17,
15 2010. Dkt. #1, Ex. 1. The full procedural history of the
16 defendant's service with summons and complaint, and its removal of
17 the case to this court, is set forth in my previous Findings and
18 Recommendation on the plaintiff's motion for remand. See Dkt. #29.

19 In her complaint, the plaintiff alleges that she was the owner
20 of real property located at 3620 S.W. Lake Point Court,
21 Wilsonville, Oregon 97070. On June 8, 2007, the plaintiff executed
22 a Promissory Note for \$460,000, in favor of World Savings Bank, in
23 exchange for a loan from World Savings Bank to the plaintiff.
24 Under the terms of the Note, the plaintiff agreed to make principal
25 and interest payments every month. See Dkt. #1-1, Complaint.

26 Also on June 8, 2007, the plaintiff executed a Deed of Trust
27 in her residential property. *Id.*, pp. 19-31. The Deed of Trust
28 was recorded in Clackamas County on June 21, 2007. It identifies

1 the plaintiff as the borrower and World Savings Bank, and its
2 successors and assigns, as the lender. Wells Fargo Bank is the
3 successor-in-interest to World Savings Bank. The Deed of Trust
4 also identifies First American Title as Trustee. *Id.*

5 The plaintiff alleges that at the time she executed the Note
6 and the Deed of Trust, she believed she was a "borrower," receiving
7 a "Mortgage Loan" from a "lender," and based on these assumptions
8 she agreed to pledge her home as collateral for the "Mortgage
9 Loan." She believed the "Mortgage Loan" would establish a "payment
10 schedule" based on the amount of the loan and the interest rate.

11 Dkt. #1-1, Complaint, ¶ 5.

12 She contends it was never truthfully disclosed to her that
13 this financial transaction, which she understood to be a "Mortgage
14 Loan," actually was a collection of contracts, agreements, and two
15 "instruments"; i.e., (1) the Note, which she describes as a
16 "negotiable financial instrument," and (2) the Deed of Trust, which
17 she describes as a "security instrument." *Id.*, ¶ 6. She asserts
18 that the Deed of Trust may be assigned to other parties, "typically
19 'mortgage servicers' who may exercise those rights, including
20 collecting payments." *Id.*

21 The plaintiff alleges she was never informed that the Deed of
22 Trust was a "Trust as defined by section 303(7) of the Trust
23 Indenture Act of 1939 [as amended through P.L. 111-72, approved
24 October 13, 2009]." *Id.*, ¶ 7 (brackets in original). She states
25 that at the time of closing on what she thought was a "Mortgage
26 Loan," she unknowingly created a "Trust" when she executed the Deed
27 of Trust, which was prepared by the lender. *Id.*, ¶ 8. She claims
28 she was the creator and settlor/trustor of the Trust, and the Deed

1 of Trust names First American Title Insurance Company of Oregon as
2 Trustee of the Trust, transfers her real property into the Trust,
3 and names the lender as beneficiary. *Id.*

4 The plaintiff purports to quote the definition of "indenture"
5 from the "Trust Indenture Act of 1939, section 303(7)," and then
6 alleges that under this definition, the Deed of Trust is not a
7 contract or an agreement, but is a trust indenture and must be
8 executed and operated within the guidelines established for the
9 execution of trusts. *Id.*, ¶ 10.

10 The plaintiff then contends that the lender purposefully
11 misrepresented facts about the financial transaction, inducing
12 induced her to create a negotiable financial instrument (the Note),
13 and to create a Trust using documents prepared solely by the
14 lender. *Id.*, ¶ 11. As a result, she contends, she unwittingly
15 conveyed her real property into the Trust, giving First American as
16 Trustee the fiduciary responsibility to manage the Trust for the
17 benefit of the lender/beneficiary. *Id.* She asserts that at
18 closing, the lender received from her as consideration a valuable
19 negotiable instrument; induced her to create a Trust naming the
20 lender as beneficiary and First American as Trustee; and convinced
21 her to convey her home into the Trust. *Id.*, ¶ 12.

22 Based on these allegations, the plaintiff brings the following
23 causes of action: (1) wrongful foreclosure; (2) fraudulent
24 misrepresentation; (3) fraudulent concealment; and (4) quiet title.
25 *Id.*, ¶¶ 25-45. In support of the wrongful foreclosure claim, the
26 plaintiff contends the defendant is not the legal holder of the
27 Note and "the security instrument, the Mortgage." *Id.*, ¶ 26. She
28 contends the March 25, 2010, "Trustee's Notice of Default and

1 Election to Sell Under Terms of Trust Deed," is fraudulent and a
2 legal nullity. *Id.*, ¶ 27. She further contends the defendant
3 lacks standing to initiate and sustain a nonjudicial foreclosure
4 and the August 19, 2010, foreclosure was based on fraudulent
5 documents and is, therefore, wrongful. *Id.*, ¶¶ 28-29. She further
6 contends she is entitled to punitive damages. *Id.*, ¶ 30.

7 In support of her fraudulent misrepresentation claim, the
8 plaintiff alleges the written agreements between herself and the
9 defendant required the defendant to deal with her fairly and in
10 good faith and not take undue advantage of her inferior knowledge,
11 skill, understanding, and experience in regard to this commercial
12 transaction. *Id.*, ¶ 32. She claims the defendant fraudulently
13 misled her into believing she was going to receive a "Mortgage
14 Loan," and the defendant falsely represented the facts regarding
15 the true nature of the transaction and the purpose of the
16 associated documents. *Id.*, ¶ 33. She further contends that as a
17 result of the defendant's intentional fraud, she has suffered
18 damages, which she seeks to recover, and she also is entitled to
19 punitive damages. *Id.*, ¶ 34.

20 As to the fraudulent concealment claim, the plaintiff contends
21 the defendant purposely concealed the fact that the Note was a
22 financial instrument that was negotiable and had value, and
23 defendant purposefully hid the fact that the Note would be
24 deposited and negotiated without any credit to the plaintiff's
25 account. *Id.*, ¶ 36. She contends the defendant purposefully
26 prepared the document and concealed the fact that the Deed of Trust
27 established a Trust with the plaintiff as creator and Trustor,
28 First American as Trustee, and the defendant as Beneficiary. *Id.*,

¶ 37. She alleges the defendant concealed "true facts" about the Note and the Deed of Trust to induce her to fraudulently convey her home to the Trust for the defendant's unjust gain, and with no consideration or compensation to the plaintiff. *Id.*, ¶ 38. Again, she alleges that she suffered damage and is entitled to punitive damages. *Id.*, ¶ 39.

Finally, in support of the quiet title claim, the plaintiff contends she is the owner of the real property at issue, and defendant is enforcing a wrongful foreclosure based on a fraudulent "Foreclosure Deed." She seeks to quiet title as of the June 24, 2005, Warranty Deed, under which she received title to the property. *Id.*, ¶¶ 42-44 & Ex. A. She seeks a judicial declaration that the title to the property is vested in her alone. *Id.*, ¶ 44.

The defendant moves to dismiss the entire Complaint for failure to state a claim for which relief may be granted. Dkt. #3 & #4.

STANDARD OF REVIEW

Chief Judge Aiken of this court recently set forth the standard for the court's consideration of a motion to dismiss in *Gambee v. Cornelius*, No. 10-CV-6265-AA, 2011 WL 1311782 (D. Or. Apr. 1, 2011) (Aiken, C.J.). Judge Aiken observed:

Under Fed. R. Civ. P. 12(b)(6), a complaint is construed in favor of the plaintiff, and its factual allegations are taken as true. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir.

2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563[, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929] (2007). "[G]enerally the scope of review on a motion to dismiss for failure to state a claim is limited to the Complaint." *Daniels-Hall*, 629 F.3d at 998.

Id. at *2.

A motion to dismiss under Rule 12(b)(6) will be granted if the plaintiff alleges the "grounds" of her "entitlement to relief" with nothing "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (internal quotation omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Id.* (citations and footnote omitted).

DISCUSSION

Judicial Notice of Additional Facts

Defendant asks the Court to take judicial notice of three documents: (1) Appointment of Successor Trustee, dated March 15, 2010; (2) Trustee's Notice of Default and Election to Sell Under Terms of Trust Deed, dated March 23, 2010; and (3) Recording Cover Sheet for Notice of Sale Proof of Compliance, recorded on August 3, 2010, and accompanying documents. The documents are attached as

1 exhibits to the September 24, 2010, Declaration of Pilar French,
2 submitted in support of defendant's Request for Judicial Notice.
3 Dkt. #6.

4 Federal Rule of Evidence 201 governs judicial notice of
5 adjudicative facts. A judicially noticed fact

6 must be one not subject to reasonable dispute
7 in that it is either (1) generally known
8 within the territorial jurisdiction of the
9 trial court or (2) capable of accurate and
ready determination by resort to sources whose
accuracy cannot reasonably be questioned.

10 Fed. R. Evid. 201(b). The court may take judicial notice whether
11 requested or not, but it must take judicial notice if requested by
12 a party and supplied with the necessary information. Fed. R. Evid.
13 201(c), (d).

14 The court may take judicial notice of documents that are
15 matters of public record without converting a motion to dismiss
16 into a motion for summary judgment. *See, e.g., Zucco Partners, LLC*
17 *v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (court may
18 consider judicially noticed documents on Rule 12(b)(6) motion);
19 *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986)
20 (district court, when determining whether complaint fails to state
21 a claim, may take "judicial notice of matters of public record
22 outside the pleadings[.]").

23 In 2007, the Supreme Court explained that in ruling on a Rule
24 12(b)(6) motion to dismiss, the may consider "other sources . . .
25 in particular, documents incorporated into the complaint by
26 reference, and matters of which a court may take judicial notice."
27 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322,
28 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007).

1 All of the documents submitted by the defendant are appro-
2 priate for judicial notice because they are matters of public
3 record and are publically available. Additionally, the plaintiff
4 expressly refers to the March 25, 2010, Trustee's Notice of Default
5 and Election to Sell Under Terms of Trust Deed, at paragraph 23 of
6 her Complaint. The plaintiff has offered no opposition to the
7 defendant's request that the court take judicial notice of the
8 relevant documents. I therefore grant the defendant's motion to
9 take judicial notice of the documents submitted with the French
10 declaration (Dkt. #6).

11 The documents submitted by the defendant show the following
12 additional facts. Since the time of the original loan, World
13 Savings Bank was acquired by Wachovia Mortgage, which itself was
14 acquired by Wells Fargo. Wells Fargo, N.A. is the successor by
15 merger to Wells Fargo Bank Southwest, N.A., formerly known as
16 Wachovia Mortgage, FSB, formerly known as Wells Fargo Bank, FSB.
17 Dkt. #6, French Declr. Ex. 1, p. 1.

18 On or about March 15, 2010, the defendant appointed Nancy K.
19 Cary to serve as successor trustee for the Trust Deed. On
20 March 25, 2010, the Appointment of Successor Trustee was recorded
21 in Clackamas County, under Recorder's No. 2010-018167. *Id.*

22 On or about March 23, 2010, the successor trustee executed a
23 Notice of Default and Election to Sell the Property. *Id.*, Ex. 2.
24 The Notice of Default indicated, *inter alia*, that the plaintiff had
25 been in default on the loan since January 2009, having failed to
26 make monthly payments of \$1,983.18, beginning January 2009, through
27 March 2010. *Id.*

1 On August 3, 2010, the successor trustee recorded in the
2 Clackamas County Recorder's Office, under Recorder's No. 2010-
3 046474, a number of documents including an "Affidavit of Compliance
4 with Oregon SB 628." *Id.*, Ex. 3, pp. 13-14. The affidavit states
5 the plaintiff did not respond to the defendant's attempt to offer
6 a loan modification. *Id.* Also with this filing, the successor
7 trustee recorded the requested proofs of service and notices
8 required by Oregon Revised Statutes sections 86.737-86.750. *Id.*
9 The foreclosure sale of the property was conducted on August 19,
10 2010. *Id.*

11 I now will turn to consideration of the defendant's motion to
12 dismiss with regard to each of the plaintiff's claims for relief.

14 ***Wrongful Foreclosure***

15 The heart of the plaintiff's wrongful foreclosure claim
16 appears to be that the defendant lacks standing to initiate and
17 sustain a nonjudicial foreclosure, and the August 19, 2010,
18 foreclosure was based on fraudulent documents. The documentary
19 evidence shows, however, that under Oregon's Trust Deed Act, the
20 defendant was permitted to undertake the foreclosure in the manner
21 it did, as outlined in the documents executed by the plaintiff.
22 Further, as explained below, because the plaintiff's fraud-based
23 claims fail to state a claim, she cannot predicate the wrongful
24 foreclosure claim on a claim of fraud.

25 A "trust deed" is a "deed executed in conformity with ORS
26 86.705 to 86.795, [which] convey[s] an interest in real property to
27 a trustee in trust to secure the performance of an obligation owed
28 by the grantor or other person named in the deed to a beneficiary."

1 Or. Rev. State. § 86.705(5). A "trustee" is a "person, other than
2 the beneficiary, to whom an interest in real property is conveyed
3 by a trust deed, or such person's successor in interest." Or. Rev.
4 Stat. § 86.705(6). A "beneficiary" is "the person named or
5 otherwise designated in a trust deed as the person for whose
6 benefit a trust deed is given, or the person's successor in
7 interest, and who shall not be the trustee unless the beneficiary
8 is qualified to be a trustee under ORS 86.790(a)(d)." Or. Rev.
9 Stat. § 86.705(1).

10 Under the Trust Deed Act:

11 Transfers in trust of an interest in real
12 property may be made to secure the performance
13 of an obligation of a grantor, or any other
14 person named in the deed, to a beneficiary.
15 Where any transfer in trust of an interest in
16 real property is made pursuant to the provi-
17 sions of ORS 86.705 to 86.795 to secure the
18 performance of an obligation, a power of sale
19 is conferred upon the trustee. The power of
20 sale may be exercised after a breach of the
obligation for which the transfer is security;
and a trust deed, executed in conformity with
ORS 86.705 to 86.795, may be foreclosed by
advertisement and sale in the manner provided
in ORS 86.705 to 86.795, or, at the option of
the beneficiary, may be foreclosed by the
beneficiary as provided by law for the
foreclosure of mortgages on real property.

21 Or. Rev. Stat. § 86.710.

22 Thus, the Trust Deed Act allows the defendant to foreclose
23 through the mechanism of a trust deed because upon breach of the
24 obligation secured by the deed, the beneficiary may choose between
25 either a judicial or nonjudicial foreclosure. The Trust Deed Act
26 specifically authorizes the creation of a trust for the purpose of
27 obligating the grantor/plaintiff to perform the terms of her loan,
28 including making monthly payments.

1 In the Trust Deed at issue in this case, the plaintiff
2 expressly agreed to the creation of a trust for the purpose of
3 securing her obligations in the Note:

4 I irrevocably grant and convey the
5 Property to the Trustee, in trust for Lender,
6 with a power of sale subject to the terms of
7 this Security Instrument. This means that, by
8 signing this Security Instrument, I am giving
9 Lender and Trustee those rights that are
10 stated in this Security Instrument and also
those rights that the law gives to lenders who
are beneficiaries of a deed of trust and to
trustees of a deed of trust. I am giving
Lender and Trustee these rights to protect
Lender from possible losses that might result
if I fail to

11 (i) pay all amounts owed to
12 Lender under the Note and all other
13 notes secured by this Security
14 Instrument, called the "Secured
Notes," including future advances
made by Lender and any changes to
the Secured Notes made with the
written consent of the Lender[.]

15 Dkt. #1-1, Complaint, Ex. B, p. 2.

16 Additionally, the plaintiff agreed that she had the right to
17 grant a security interest in the property and she promised to pay
18 all principal and interest due under the Note. *Id.*, pp. 2-3.
19 Finally, the Trust Deed provided that the lender was empowered to
20 exercise the power of sale if the plaintiff failed to make her
21 payments or otherwise breached her obligations. *Id.*, p. 9.

22 The plaintiff's initials appear on every one of the twelve
23 pages of the Trust Deed, except for page eleven where her entire
24 signature appears instead of her initials. See Dkt. #1-1, Ex. B.

25 Other than her argument that the transaction was based on
26 fraudulent documents, addressed below, the plaintiff fails to
27 articulate facts showing any basis for her wrongful foreclosure
28

1 claim. The Trust Deed document she attaches to her Complaint shows
2 that she granted a security interest in the property as collateral
3 for the Note under Oregon's Trust Deed Act. Under the relevant
4 statutes, the defendant had the right to sell the property in a
5 nonjudicial foreclosure, upon the plaintiff's failure to make the
6 payments she was obligated to make. The plaintiff makes no
7 allegation that the defendant failed to follow the proper
8 procedures or in any way failed to comply with the law regulating
9 nonjudicial foreclosures. I recommend that the defendant's motion
10 to dismiss the wrongful foreclosure claim be granted.

11 12 ***Fraudulent Misrepresentation***

13 The gravamen of this claim is that the defendant misrepre-
14 sented to the plaintiff the import of the documents she signed at
15 the time of closing on the loan. She contends the defendant failed
16 to inform her that the Trust Deed created a trust in which she
17 granted the property for the purpose of securing her performance on
18 the Note. The defendant argues this claim is time-barred, fails to
19 comply with the pleading requirements of Federal Rule of Civil
20 Procedure 9(b), and in any event, is inconsistent with the facts as
21 demonstrated by the actual loan documents. I agree with the
22 defendant.

23 A fraud claim must be commenced within two years from the
24 discovery of the fraud or deceit. Or. Rev. Stat. § 12.110. A
25 plaintiff "discovers" fraud when the plaintiff knew or should have
26 known about it. *Bell v. Benjamin*, 232 Or. App. 481, 485-86, 222
27 P.3d 741, 743-44 (2009). The "knew or should have known" analysis
28 has two steps: (1) it must appear that the plaintiff had sufficient

1 knowledge "to excite attention and put a party upon [] guard or
2 call for an inquiry[]"; and (2) if the plaintiff had such
3 knowledge, "it must also appear that a reasonably diligent inquiry
4 would disclose the fraud." *Id.*, 232 Or. App. at 486, 222 P.3d at
5 744 (internal quotation omitted). Although typically a question
6 for the jury, when only one conclusion reasonably can be drawn, the
7 issue is for the court. *Id.*

8 In *Bell*, the plaintiff argued that the defendants defrauded
9 him in the sale of his home when they failed to pay him a certain
10 amount of money upon the closing of the sale. The court found the
11 plaintiff's claim was time-barred because, as a matter of law, the
12 plaintiff was aware at the closing that he did not receive the
13 promised funds, which should have been enough to "excite" his
14 attention, and his suit was filed more than two years after the
15 closing date. *Id.*

16 In the present case, the facts as alleged in the Complaint,
17 along with the relevant documents, show that the plaintiff's claim
18 is time-barred because a jury could reach only one conclusion
19 regarding the events. Although the plaintiff contends the
20 defendant concealed from her that the Trust Deed created a trust
21 and conveyed the property into a trust, the Trust Deed bears the
22 plaintiff's initials on every page, as well as her signature on
23 page eleven. She also signed the Note. She reviewed and signed
24 the loan documents that expressly specified the creation of a trust
25 and the conveyance of the property into the trust on June 8, 2007.

26 The court does not credit as true the plaintiff's conclusory
27 allegations regarding the nature of the documents and their alleged
28 effect. The documents speak for themselves and clearly create a

1 uniform transaction commonly entered into by home buyers. The
2 plaintiff's signature on the documents, while not proof that she
3 actually read them, shows that she was presented with the documents
4 on June 8, 2007. The act of signing those documents should have
5 been enough to "excite" her attention, or cause her to read the
6 documents and inquire about the legitimacy of the documents and
7 their meaning. Moreover, there are no facts suggesting the
8 plaintiff could not have conducted a "reasonably diligent" inquiry
9 at that time into what she alleges was fraudulent conduct by the
10 defendant.

11 The facts as alleged in the Complaint and the accompanying
12 documents show that only one reasonable conclusion can be made
13 regarding the "knew or should have known" inquiry; i.e., the
14 plaintiff knew or should have known on June 8, 2007, of the alleged
15 fraud. Thus, the fraudulent misrepresentation claim filed in this
16 case on August 17, 2010, is untimely.

17 Even if the claim were timely, I agree with the defendant that
18 the plaintiff's claim should be dismissed. Again, the heart of
19 this claim is that the defendant allegedly misled the plaintiff
20 about the fact that the Trust Deed created a trust in which the
21 plaintiff pledged the property to secure the performance of her
22 obligations under the Note. But the alleged "misrepresentation" is
23 belied by the very documents the plaintiff signed. As described
24 above, the Trust Deed explicitly informed her that the property
25 would be put in a trust. The Trust Deed is entitled "DEED OF
26 TRUST" and states in bold and uppercase letters at the very top of
27 the first page that it is a "DEED OF TRUST" which "secures a note."
28 Dkt. #1-1, Ex. B. It defines the Deed of Trust as a "Security

1 Instrument." *Id.* It identifies the plaintiff as the
2 borrower/trustor, the defendant's predecessor as the lender/
3 beneficiary, and First America as the trustee. *Id.* It expressly
4 states that the note signed by the plaintiff on the same date as
5 the Deed of Trust shows that the plaintiff owed the defendant an
6 original principal amount of \$460,000, plus accrued and deferred
7 interest, and she promised to pay the debt in regularly scheduled,
8 periodic payments as provided in the Note and in full by June 15,
9 2037. *Id.*

10 The plaintiff expressly granted the property to the Trustee,
11 in trust for the defendant, with a power of sale. *Id.*, p. 2. She
12 also expressly agreed to the defendant's right to appoint a
13 successor trustee of the property. *Id.*, p. 9.

14 The plaintiff does not allege that she did not read the loan
15 documents, including the Trust Deed. But even if she did, she
16 cannot avoid enforcement of the contractual obligations by claiming
17 a failure to read the contract. *See, e.g., Knappenberger v.*
18 *Cascade Ins. Co.*, 259 Or. 392, 398, 487 P.2d 80, 83 (1971) (party
19 bound by terms of insurance policy purchased by him even though he
20 was unaware of those terms because he failed to read the policy);
21 *DiTommaso Realty, Inc. v. Moak Motorcycles, Inc.*, 96 Or. App. 431,
22 434, 773 P.2d 391, 392 (1989) (liquidated damages clause in listing
23 agreement enforceable even if defendant did not read the
24 agreement). Additionally, any failure by the plaintiff to
25 understand the terms in the documents does not make the use of
26 those terms by defendant fraudulent. *See Knappenberger*, 259 Or. at
27 398, 487 P.2d at 83.

1 The facts alleged in the Complaint, along with Exhibits B and
2 C to the Complaint, fail to allege a plausible claim for fraudulent
3 misrepresentation. I recommend that this claim be dismissed.*
4

5 ***Fraudulent Concealment***

6 In this claim, rather than alleging the defendant affirma-
7 tively misrepresented the nature of the loan and Trust Deed
8 documents, the plaintiff contends the defendant purposefully
9 concealed information about the Note and the Trust Deed. The
10 discussion above in connection with the fraudulent misrepresen-
11 tation claim is equally applicable here. The claim is time-barred
12 because the plaintiff either knew or should have known of any
13 alleged fraud claim based on concealment at the time of closing.
14 Additionally, given that the documents the plaintiff signed at
15 closing state exactly what they are and what they do, she fails to
16 state a claim for fraudulent concealment. Rather than "concealing"
17 their nature, the documents clearly "reveal" what they are. I
18 recommend that this claim be dismissed.
19

20 ***Quiet Title***

21 The plaintiff's quiet title claim is based on her theory that
22 the defendant did not have the right to nonjudicially foreclose on
23 her property because of the defendant's fraudulent conduct. Based
24 on the facts in the Complaint, the exhibits to the Complaint, and
25 the documents I have judicially noticed, this claim has no merit.
26

27
28 *Given my recommendation, I find it unnecessary to address
defendant's Rule 9(b) argument.

1 For all the reasons set forth above, this claim should be
2 dismissed.

3 4 **CONCLUSION**

5 In summary, the plaintiff's Complaint, when considered with
6 the exhibits to the Complaint and the documents submitted by the
7 defendant, fails to meet the standards articulated in *Twombly* and
8 in *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949, 173 L.
9 Ed. 2d 868 (2009). In addressing these two cases, the Ninth
10 Circuit has explained that "for a complaint to survive a motion to
11 dismiss, the non-conclusory factual content and reasonable
12 inferences from that content, must be plausibly suggestive of a
13 claim entitling the plaintiff to relief." *Moss v. United States*
14 *Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). The allegations
15 in the plaintiff's Complaint do not meet that standard. I see no
16 path by which the complaint could be amended successfully. I
17 therefore recommend the defendant's motion to dismiss, Dkt. #3, be
18 granted, and the plaintiff's claims be dismissed with prejudice.

19 20 **SCHEDULING ORDER**

21 These Findings and Recommendation will be referred to a
22 district judge. Objections, if any, are due by **May 31, 2011**. If
23 no objections are filed, then the Findings and Recommendation will
24 go under advisement on that date.

1 If objections are filed, then a response is due by **June 17,**
2 **2011.** When the response is due or filed, whichever date is
3 earlier, the Findings and Recommendation will go under advisement.

4 IT IS SO ORDERED.

5 Dated this 12th day of May, 2011.

6 /s/ Dennis J. Hubel

7
8

Dennis James Hubel
Unites States Magistrate Judge